BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBIN BRETZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,638
CENTRAL KANSAS MEDICAL CENTER,	)	
Respondent	)	
	)	
AND	)	
	)	
PREFERRED PROFESSIONAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier appealed the preliminary hearing Order dated November 2, 2001 entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Judge Moore awarded claimant preliminary hearing benefits. The respondent and its insurance carrier (respondent) contend Judge Moore erred in finding claimant sustained accidental injury arising out of and in the course of her employment with respondent on July 17, 2001, and that timely notice of accident was given to the employer. [1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, and considering the arguments in the briefs by the parties, the Appeals Board finds that the award of preliminary hearing benefits should be reversed.

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[1] It appeared from the discussion between the court and counsel at page 10 of the November 2, 2001, Preliminary Hearing Transcript that notice was not seriously contested. In addition, notice was neither listed nor argued by respondent in its brief. It was, however, listed as an issue in respondent's Application For Review by Worker's Compensation Appeals Board.

Claimant is employed by respondent as a respiratory therapist. She testified that she injured her low back during the early part of her work shift on July 17, 2001, assisting a patient to sit up in bed. Claimant said that she and a nurse placed a sheet beneath the patient and, on the count of three, both pulled. Claimant testified that she felt immediate pain and dropped the patient, ". . . my back felt like it gave. I don't know, I've never had back pain before, but it was excruciating, and I didn't say anything, I just said, sorry, Rodney, I dropped you. I said, it hurt me more than it hurt you. And he said, no problem. And I just slowly walked away."[2]

Claimant said the nurse that was present was either Debra Rodgers or Frannie Rome. Both Ms. Rodgers and Ms. Rome testified at the preliminary hearing and neither could recall the incident claimant described. Ms. Rome did not recall participating in a team lift with a large patient named Rodney Eller. Likewise, she did not recall witnessing Ms. Bretz drop a patient or injure herself. Ms. Rodgers recalled the patient but did not recall being in Mr. Eller's room with claimant nor did she recall an incident where she assisted someone in lifting that patient and the patient falling back on the bed. Ms. Rodgers said that it was possible that she worked with Mr. Eller as a patient in July, 2001, and she might recall at some point claimant saying something about a back injury, but she could not say when that was or under what circumstances it might have been said. Nevertheless, she denied witnessing anything like what claimant described.

During her testimony claimant repeated her statement that she had no prior back problems. However, when she was confronted with a January 7, 2000 office note from her personal physician, Dr. Fieser, which described claimant having complaints of low back pain, she acknowledged making those complaints but said she did so only to obtain medication to assist her with weight loss.

Claimant sought medical treatment with her personal physician on July 24, 2001. Dr. Fieser's office records indicate that she presented complaints of flank pain and low back pain, but with no history of injury. Claimant disputes this history and insists that she told Dr. Fieser about her injury at work.

Despite her training to immediately report all accidents and injuries, claimant did not complete an incident report until July 24, 2001. In that incident report claimant reiterated experiencing an immediate onset of pain while attempting to pull a patient up in bed. "As soon as we counted to three & lifted patient up in bed; instant sharp pain hit my lower back. And I let go of my side of the patient."[3]

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[2] Tr. of Prel. H., at 14 (Nov. 2, 2001).

[3] Tr. of Prel. H., Respondent's Ex. B (Nov. 2, 2001).

Claimant did not report an injury on July 17, 2001. She worked two days after the incident and likewise did not report an accident or injury. Claimant's supervisor, Mr. Cagle, testified that he worked with claimant two days, July 17 and 18 before claimant reported the accident on July 24. Mr. Cagle's last day of work was on July 22 before he started a vacation on July 23.[4] He testified that claimant never mentioned an accident or injury and that claimant did not appear to be in any pain. Mr. Cagle was the person to whom claimant should have reported any workers compensation matters. He was not working, however, on July 24, the day claimant says she first reported her injury. Mr. Cagle also testified concerning the training employees receive in reporting accidents and specifically testified concerning Ms. Bretz's attendance at a "poster fair" where workers compensation procedures were also covered.

Mr. Cagle's supervisor, Priscilla Warrick testified that she is a nurse manager and is the person to whom claimant should have reported her injury in Mr. Cagle's absence. Despite the fact that Ms. Warrick was at work on July 24, claimant chose instead to report her accident to a fill-in supervisor, Lori Vainer, who is also claimant's sister. Claimant also said that Lori Vainer knew about her injury before July 24. Ms. Vainer never told Ms. Warrick of claimant's injury. Instead, Ms. Warrick learned of claimant's injury sometime after July 30, 2001, from Mr. Cagle. Ms. Warrick also testified concerning claimant's instruction in workers compensation procedures. Claimant testified, however, that she did not know what the procedures were for reporting an accident. Claimant also said she could not say anything to Mr. Cagle or anyone else before July 24, "because everybody was gone out of town. . . . "[5] Claimant thinks it was that same day, July 24, when she spoke with Linda Francis, who is with respondent's Human Resources department, about her injury and arrangements were made for claimant to receive authorized medical treatment. Claimant said she completed a second incident report form for Ms. Francis. Claimant's signature appears on an Employee Incident Report form dated July 24, 2001, but the Manager Report of Employee Accident form signed by Ms. Vainer is dated July 30, 2001.[6] Neither Ms. Francis nor Ms. Vainer testified at the Preliminary Hearing.

The Workers' Compensation Act places the burden of proof upon the claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.[7] "Burden of proof" means the burden to persuade the trier of facts by a preponderance of the credible evidence that a party's position on an issue is more probably

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[4] Mr. Cagle testified he ". . .worked the 18th, was off for two days and then worked Sunday." Tr. of Prel. H., at 42. But July 18, 2001 was a Wednesday, so the third day after would be Saturday, the 21st, not Sunday the 23rd. Possibly Mr. Cagle meant to say that he worked with claimant on the two days after April 17, but this is unclear.

[5] Tr. of Prel. H., at 17 (Nov. 2, 2001).

[6] Tr. of Prel. H., Respondent's Ex. B (Nov. 2, 2001).

[7] K.S.A. 44-501(a); Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993).

true than not true when considering the whole record.[8] The record contains numerous inconsistencies and contradictions which, if taken individually, may not amount to much but when taken together seriously call into question claimant's claim of a work related injury. Obviously, nurses assist many patients in the course of their work day and may not recall a specific incident such as claimant described. However, the fact that claimant described immediate and excruciating pain causes one to question why she did not make that known to the nurse that was present at the time, nor report it to her supervisor during that shift as she was trained to do. Furthermore, claimant worked two full days after her alleged injury and described worsening symptoms, yet still did not report the accident. It was not until after a weekend where she did not work and a visit to her personal physician that claimant finally decided to give notice and make a report of accident. It is also troubling that her personal physician's notes not only fail to mention a work related injury, but show claimant specifically denied an accident or injury precipitated her symptoms.

Based upon the records compiled to date, the Appeals Board finds the greater weight of the evidence fails to support claimant's contentions. Therefore, the ALJ's decision to award preliminary benefits should be reversed.

As provided by the Act, preliminary hearing findings are not binding, but are subject to modification upon a full hearing on the claim.[9]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bruce E. Moore on November 2, 2001, should be, and the same is hereby, reversed and benefits are denied.

IT IS SO ORDERED.

Dated this ____ day of February, 2002.

BOARD MEMBER

c: Robert L. Feldt, Attorney for Claimant
Kristine A. Purvis, Attorney for Respondent

[8] K.S.A. 44-508(g); In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 44-534a(a)(2).

Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director